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No. 90-5744

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD CHAPMAN, et. al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent(s)

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF ON THE MERITS OF RESPONDENT, STANLEY MARSHALL,

In Support of Petitioners, Urging Reversal

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QUESTIONS PRESENTED

1. Does the phrase "mixture or substance including ... L.S.D.," the weight of which is the basis for sentence under 21 U.S.C. 841(b)(1)(A)(v), include the weight of carrier media upon which the L.S.D. is placed prior to sale?

2. Does basing a sentence on the fortuitous weight of the carrier on which L.S.D. is placed prior to sale violate the right to Due Process of Law?

3. Is there a fundamental right to "fairness" in criminal sentencing, impairment of which must be strictly scrutinized?

Additionally, Marshall propounds the following question in section IV of this brief:

4. Is a sentence based primarily on the adventitious weight of an inert substance on which an illegal drug is placed prior to sale disproportionate and thus prohibited by the Eighth Amendment?

STATEMENT OF PARTIES

Marshall was a party to the proceeding whose judgment is reviewed herein, hence is a respondent in this case under Rule 12.4.

However, because his interest is allied with that of petitioners, he submits a brief supporting their position.

The Court is advised that prior to the granting of certiorari in the instant case, Marshall submitted his own petition for certiorari which raises issues similar to those in the instant case. All parties to the instant case were served with copies of that petition, which remains pending. */

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*This unusual scenerio occurred for the following reason: Marshall was prosecuted in a proceeding unrelated to that involving petitioners. Because their separate appeals raised identical issues, their cases were con-solidated, on appeal, for decision en banc. After the Court of Appeals rendered its decision, Chapman immediately petitioned for certiorari. Marshall sought rehearing in the Court of Appeals before filng his own petition.

Should the Court be of the opinion that Marshall is not a party here despite the foregoing, he respectfully requests that he be given opportunity to file the within brief as an amicus brief.

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No. 90-5744
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THE UNITED STATES OF AMERICA

BRIEF OF RESPONDENT, STANLEY MARSHALL
In Support of Petitioners,
Urging Reversal of Judgment

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported as United States v. Marshall 908 F.2d 1312 (7 Cir. *en banc.*, 1990). The opinion of the District Court in respondent's case is reported as United States v. Marshall 706 F.Supp. 650 (C.D., Ill., 1989). The opinion of the District Court in petitioner's case, (United States v. Chapman, et. al., No. 89-CR-46, W.D., Wis., 1989), is unreported.

JURISDICTION

Marshall adopts the jurisdictional statement of petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Marshall adopts the statement of relevant provisions of law as stated by Chapman.

Regarding section V of this brief, the Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Marshall was arraigned on September 8, 1988 on a superseding indictment charging him with conspiring to distribute L.S.D. during January through June of 1988 in violation of 21 U.S.C. 841(a)(1) [(count

I)]; using a communication facility during May 2, 31, and June 7 and 8, 1988 to facilitate the foregoing in violation of 21 U.S.C. 843(b), [(counts II, III, IV, and V)]; and with distributing more than ten grams of "a mixture or substance containing a detectable amount of lysergic acid diethylamide (L.S.D.)," on March 9-17, 1988, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. (Superseding Indictment).

On February 7, 1989, Marshall agreed to a bench trial and stipulated that the Government proof at trial would be, (in essence), as follows:

In March of 1988, an agent of the Drug Enforcement Agency seized an aggregate of 11751 doses of L.S.D. from Meirl Neal and Lyndon Harlow in Springfield, Illinois. (Stip. at 1-2). Harlow, cooperating with the D.E.A., named Marshall as his source, (Stip. at 3, 5), and participated in a series of tape-recorded conversations with

Marshall at which further L.S.D. transactions were discussed. (Stip. at 4) This stipulation effectively conceded all elements of all counts, save for the allegation in count VI charging that Marshall distributed "more than ten grams" of a "mixture or substance containing L.S.D.," the truth of which was the sole disputed issue at the bench trial. Both the defense and the Government produced testimony from expert witnesses on this issue.[1]

The testimony was as follows:

L.S.D. is a non-habit forming hallucinogenic drug (Tr. 31, 67), originally tested for legitimate use in psychiatry,

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[1] The Government called Richard Gelsomino, a forensic chemist with the Drug Enforcement Agency since 1972. (Tr. 6-8).

The defense called James O'Donnell, D.Pharm., a pharmacologist, pharmacist, and nutritionist, who is affiliated with Rush Medical College in Chicago and who also maintains his own consulting firm. Dr. O'Donnell has, on occasion, consulted for both the defense and for the Government. (Tr. 61-65, 79-80).

(Tr. 67), but now controlled as a schedule I substance. (Tr. 12, 15). When ingested, (Tr. 32), the drug causes sensory distortions and depersonalization which users refer to as "a trip." (Tr. 67:16).

The drug occurs as a free base which is soluble in certain organic liquids. (Tr. 38, 39, 68). L.S.D. can also be made into a tartrated salt, which can dissolve in water. (Tr. 39; cf., Tr. 68, 81).

In these forms, L.S.D. is clinically effective in incredibly small amounts. The Government's chemist testified at trial that he had personally seen doses of L.S.D. weighing as little as twenty millionths of a gram, and the strongest dose of L.S.D. he had ever encountered weighed two hundred micrograms. (Tr. 34, 37). Marshall's L.S.D. was sold in doses of anywhere from forty-five to seventy-five micrograms. (Tr.

23, 25, 52).[2]

This is so small an absolute quantity of L.S.D. that it is impossible to isolate it for actual ingestion. As such, L.S.D. is commonly placed onto "carriers" and ingested in this more tractable form.[3] Examples of these carriers are food, sugar cubes, gelatin, and extremely thin "blotter paper." (Tr. 48, 49, 77, 81, 83).[4]

Because L.S.D. is "bought and sold by

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[2] The sentencing guidelines state that an average dose of L.S.D. weighs fifty micro-grams. (U.S.S.G. 1990 Ed., 2D1.1, 2.51, "Typical Weight Per Unit Dose ... Table)." At the time of Marshall's offense, the typical weight per dose was assessed at 100 micrograms.

[3] In the words of the trial court: "The pure chemical compound of L.S.D. is extremely potent,--far too potent to be of any use to those who would ingest it. It is therefore necessary to dilute the solid L.S.D. and convert it into an easily digestible form." United States v. Marshall 706 F.Supp. 650, 652 (C.D. Ill., 1989).

[4] L.S.D. can also be mounted on tablets. Although this is rarely done, (Tr. 81), this Court has encountered at least one L.S.D.-on-tablets case. Dorzynski v. United States 418 U.S. 424, 426 (1974).

dosage units, not bought and sold by weight," (Tr. 30:24-25), the form of the specific carrier makes little difference to the consumer of L.S.D. Moreover, it is immaterial whether the carrier is ingested along with the drug. (Tr. 49). Whether blotter paper, for example, is chewed, swallowed, placed in a drink, sucked, or licked, the user will absorb the L.S.D. so long as a mucous membrane is exposed to it. (Tr. 48-49, 77, 83).[5]

In the instant case, the carrier was blotter paper. (Tr. 8, 17).

L.S.D. is applied to blotter paper by dissolving or suspending it in solution, which is in turn either dotted on the paper from pipettes, (Tr. 33), or evenly applied by dipping or spraying. The liquid portion of the solution evaporates, leaving the

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[5] The defense chemist also spoke of the possibility that the drug could be absorbed transdermally. (Tr. 77).

L.S.D. (Tr. 32-33). Tests revealed that Marshall's L.S.D. was applied through one of the methods ensuring even distribution. (Tr. 18, 33).

The Government's expert testified that he calculated drug weights in this case pursuant to a standardized Drug Enforcement Agency form which contains spaces for listing the "net" and "total net" weight of a sample. (Tr. 21, 42-43).[6]

The "total net" is the weight of the L.S.D., alone. (Tr. 46). The "total net" in this case was .67072 grams. (Tr. 47). *Not* included in this "total net" was the weight any isomers of L.S.D. which happened to be included in the sample. (Tr. 17).[7]

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[6] The form also contains a space for "gross" weight. The "gross" weight is the weight of the L.S.D., blotter paper, and the evidence envelope, (Tr. 43, 44), and does not figure in this case.

[7] An isomer is a molecule with the same chemical formula as another molecule (continued...)

The "net" weight is the weight of the blotter paper plus L.S.D. (Tr. 45). Marshall's sentence was based on this "net" weight.

When "net" weight is figured, not only the paper and the drug are weighed, but any impurities which happen to be on the paper are also weighed. (Tr. 46).

The "net" here came to 113.32 grams, which translates to .96 grams per average dose. (Slip Op. at 4, fn. 1; United States v. Marshall, supra, 908 F.2d at 1316, fn. 1).[8] The ratio of Marshall's aggregate L.S.D. to Marshall's aggregate paper was

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[7](...continued)
but in which the atoms are differently arranged in space. (Tr. 15-16). L.S.D. isomers are classed as controlled substances in the same "schedule" as is L.S.D. (Tr. 16; 21 U.S.C. sections 802(14); 812 Schd. I(c)(9)). Two blotter paper exhibits in this case showed the presence of L.S.D. isomers. (Tr. 15).

[8] Marshall's several blotter papers, although differing slightly in weight and appearance, all weighed very close to the same net-per-dose amount. (Tr. 20-29)

0.59%, i.e., Marshall's paper agglomerate was a bit over half-of-one-per-cent L.S.D.

The Government's expert testified that he included the weight of the paper into the "net" because it is "standard operating procedure," (Tr. 48:16), to do so in L.S.D. cases. In determining the weight of any drug, "[a]ll I can do is do what they tell me to do, and per their rules I have to weigh it as it comes." (Tr. 51:10-11).[9]

The defense expert testified that the blotter paper was a "vessel," (Tr. 78),[10] i.e., a "container," (Tr. 79), similar to a vial, ampule, or "patch." (Tr. 72-75). The

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[9] Procedures vary with other drugs. For example, gelatin capsules are not weighed if the drug is powdered, (Tr. 50), nor if the drug is a non-prescription (Schedule I) drug, (e.g. L.S.D.) (Tr. 56).

With cocaine, the glass vial in which the cocaine is packed is not weighed, (Tr. 50, 53), but the filler with which cocaine is "cut" is weighed. (Tr. 54).

[10] The Government's witness was equivocal as to whether L.S.D. carrier-media are "vessels." (Tr. 49-50).

blotter paper was not part of the drug, itself. (Tr. 79). Although the paper is a "substance" in ordinary parlance, (Tr. 83), it is not a "substance" in any pharmacological sense. (Tr. 86).

The trial court found Marshall guilty, holding that the blotter paper was a "mixture or substance containing L.S.D.," equivalent to the "cut" in cocaine transactions,[11] or the stalks and roots of marijuana plants. (Tr. 120-123). In a written opinion, [United States v. Marshall 706 F.Supp. 650 (C.D. Ill., 1989)], the Court elaborated on these findings.

Marshall appealed to the Court of Appeals for the Seventh Circuit. After the case was argued before a three judge panel of that Court, the Court set the matter for

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[11] The Government's expert had testified that L.S.D. on blotter paper is *not* "cut" in the same sense as cocaine is cut with filler. (Tr. 55).

argument *en banc* in conjunction with the pending appeals of Chapman, et. al. After argument, the Court of Appeals affirmed the Marshall's conviction, along with those of petitioner and his codefendants, by a six-to-five vote. This case is before the Court on Chapman's petition for certiorari.

SUMMARY OF ARGUMENT

I

Sentencing in L.S.D. cases when based on carrier weight yields freakish results. Sentence length varies radically according to an adventitious factors unrelated to criminal culpability. Smaller dealers may be punished more severely than larger ones merely because they mount their drug on a heavier package for distribution.

(A)

"Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Simpson v. United States

435 U.S. 6, 15 (1978). The "mixture or substance" language in the penalty statute (and corresponding Guidelines) is so ambiguous that the rule of lenity must be applied in this case.

(B)

The statutory language is ambiguous. Ironically, while all Courts have thus far held that the statutory language has a plain meaning, these same courts have divided as to the meaning of key words in the supposedly "plain" phrase. [E.g., compare United States v. Bishop 894 F.2d 981 (8 Cir., 1990), with United States v. Marshall 908 F.2d 1312 (7 Cir., *en banc*, 1990) regarding the definition of "substance containing."].

One reason for the confusion is that the words "substance" and "mixture" each have various "dictionary" meanings, some of which preclude deeming carrier media a "substance or mixture containing L.S.D.."

Moreover, in chemistry, "mixture containing L.S.D." may be a term of art, referring to L.S.D. tartrate, a different form of the drug.

Reasonable judges, as well as criminal justice professionals have become confused from this array of contradictory meanings of the words in the statute, which can therefore fairly be described as "ambiguous."

(C)

Even if the words of the statute were plain, the legislative history suggests that Congress did not intend to apply them to carrier media. The phrase "mixture or substance" was introduced without comment into the statute to replace somewhat different language directed at "kingpins" who diluted their drugs in order to increase the volume of sales. This consideration is irrelevant to L.S.D., which is marketed by the dose. There is nothing in L.S.D. sales

equivalent to the "cutting" of drugs such as heroin and cocaine, which was the apparent target of such language. Moreover, calculating L.S.D. sentences on the weight of carrier media punishes mid-tier L.S.D. dealers more than heroin or cocaine kingpins, a result clearly not intended by Congress, which does not appear to have regarded L.S.D. as a special menace.

(D)

The resulting punishment schedule warps the whole structure of the uniform Determinate Sentence Law. It is doubtful that Congress intended to undermine its recently and carefully architected determinate sentence scheme merely to impose long punishments in L.S.D. cases.

II

Sentencing schemes which discriminate between like defendants on the basis of arbitrary factors violate the Equal Protection component of the Due Process

Clause of the Fifth Amendment. Marshall v. United States 414 U.S. 417 (1974); Bolling v. Sharpe 347 U.S. 497 (1954). Carrier-weight-based sentencing, even if intended by Congress, violates Due Process.

(A)

A person who sells L.S.D. on blotter paper is not a worse criminal than one who sells it on a lighter medium. To distinguish between like offenders on this basis is irrational.

(B)

Distinguishing between offenders on the basis of carrier weight frustrates the whole purpose of Anti-Drug legislation. Carrier-weight-based sentencing can readily be evaded by methods which will only make the job of law enforcement more difficult in L.S.D. cases.

(C)

Nor can a rational reason for the sentencing scheme be advanced. The

Government has offered none. The Court of Appeals has offered three, but they are meritless. For example, Congress realized that L.S.D. sales were diminishing, not increasing, as of 1986, so there is no reason to conclude that it passed a law to eliminate blotter paper as the source of its "renewed success."

(D)

While Congress need not punish similar conduct identically, it is impermissible for Congress to set out, in a single sentencing statute, an irrational range of penalties. Enforcement of such irrational penalties is assailable as a violation of Equal Protection. United States v. Batchelder 442 U.S. 114, 124-126 (1979).

III

Another Due Process violation implicit in carrier-weight-based sentencing is that it fails to convey, with sufficient clarity, the consequences of trafficking in L.S.D..

Prior to any decisional law on the subject, Marshall found himself subjected to harsh and novel penalties under a newly enacted and ambiguous statute, in violation of the Due Process clause of the Fifth Amendment.

IV

Marshall joins in petitioner Chapman's contention that sentencing discriminations involve the fundamental right to "liberty" as provided in the Due Process clause. As such, statutes which impose unequal sentences on like defendants for identical crimes should be strictly scrutinized by this Court. Cases which suggest that sentencing schemes should be tested on the basis of their mere rationality did not, in fact, involve punishment schemes. Rather, they involved schemes which unequally allocated benefits, such as "good time," to sentenced inmates.

V

(A)

Marshall respectfully invokes leave by this Court to present an issue litigated below and raised by him in his own certiorari petition which, for procedural reasons, has not yet been acted on by this Court. Cf., Peters v. Kiff 407 U.S. 493, 495 (1972). He sincerely believes that this claim is important in the analysis of this case.

(B)

The Eighth, Amendment prohibition against cruel and unusual punishments is violated when adventitious conduct not related to actual culpability forms essentially the entire basis for a lengthy criminal sentence, especially when that sentence exceeds the length of sentences given to offenders who violate other comparable provisions of the same statute.

This Court has long recognized that

punishment cannot permissibly be based on non-culpable "status," Robinson v. California 370 U.S. 660 (1962)], or be unrelated to the gravity of the actual offense. Solem v. Helm 463 U.S. 277 (1983). Applying this doctrine to forfeiture, the Ninth Circuit has held that it is a violation of the Eighth Amendment to seize an entire enterprise when only a portion of it has been devoted to criminal conduct. United States v. Busher, 817 F.2d 1409 (9 Cir. 1987).

Roughly seventy-five percent of the length of Marshall's sentence is based on the weight of paper which is, of itself, probably not illegal to possess and which certainly did not add to his culpability in the instant offense. This is in violation of the prohibition against cruel and unusual punishments in the Eighth Amendment of the Constitution.

ARGUMENT

I

CONGRESS NEVER PASSED A LAW ALLOWING INERT "CARRIERS" TO BE WEIGHED WHEN CALCULATING SENTENCES IN L.S.D. CASES

Introduction: Sentencing in L.S.D. Cases Based On Carrier Weight Yields Freakish Results

Unlike most "street" drugs of abuse, L.S.D. is not marketed or consumed according to the weight of the "mixture or substance" into which it is diluted.

Instead, L.S.D. is marketed and consumed by the dose. Should weight be specified,--and there is no indication that it was specified in the instant case,--it is the weight of pure L.S.D. per dose. No "trade usage" has grown to discount for dilution of the product.[12]

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[12] This is not to say that L.S.D. might never be sold in a mixture with some other drug, e.g., with methamphetamine.

(continued...)

Nonetheless, Congress has chosen to punish transactions in L.S.D. on the basis of the weight of "mixtures or substances containing" it. 21 U.S.C. 841(b)(1)(A)(v). Corollary provisions in the Sentencing Guidelines[13] fix the precise sentence, again based on the weight of the "mixture or substance."

Since Congress is empowered to have made this choice of penalty structure, the

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[12](...continued)
But this is not at issue here. In this case, as in all of the others published on the issue posed in this case, the item marketed by the defendant appears to have been "pure" L.S.D. mounted on some sort of carrier medium. See, United States v. McGeehan 824 F.2d 677, 681 (8 Cir., 1987), cert. den. 484 U.S. 1061 (1988). United States v. Daly 883 F.2d 313 (4 Cir., 1989); United States v. Taylor 868 F.2d 125 (5 Cir., 1989); United States v. Elrod 898 F.2d 60 (6 Cir., 1990); United States v. Rose 881 F.2d 886 (7 Cir., 1989); United States v. Bishop 894 F.2d 981 (8 Cir., 1990); United States v. Larsen 904 F.2d 562 (10 Cir., 1990); United States v. Healey 729 F. Supp. 140 (D.C. Cir., 1990).

[13] U.S.S.G. section 2D1.1 at fn. "*." See, gen., United States v. Daly 883 F.2d 313, 316-317, 317, fn. 4 (1989).

wisdom of it is beyond the reach of argument in this case.

The choice has, however, presented a significant problem for the Courts. Although L.S.D. is never sold in diluted form, it is rarely sold all by itself. This is because individual doses of L.S.D. are so very light and small that they must necessarily be delivered to the consumer "wrapped up" in larger packages. The packages, referred to hereafter as "carrier media," include extremely thin "blotter paper," the carrier in the instant case.

The Government has urged in this and other cases that the phrase "mixture or substance containing L.S.D." refers to these carrier media.

If the Government's interpretation is accepted, sentences in L.S.D. cases will be based almost wholly on the weight of the "carrier media". This has three consequences.

First, sentences in L.S.D. cases will be very, very long. While typical carrier media are light, they weigh much more than does L.S.D. Gelatin is forty times heavier than the drug.[14] Marshall's blotter paper weighed a bit less than one-hundred-seventy times as much as his L.S.D.

The absolute weights specified in the sentencing statute are small, (most likely a consequence of the extreme potency of L.S.D.); a mere ten grams (a third of an ounce) triggers a mandatory ten-year minimum sentence. 21 U.S.C. 841(b)(1)(A)(v). However light a carrier may be, it is so much heavier than L.S.D. that small quantities of it can build up to ten grams quickly, and minute increments can increase sentence exposure drastically thereafter.

In the instant case, Marshall

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[14] United States v. McGeehan 824 F.2d 677, 680 (8 Cir., 1987) (gelatin tabs weigh .00225 grams per dose).

trafficked in .67072 grams of L.S.D. mounted on 112.65 grams of inert paper. Had he been sentenced for the L.S.D. alone, he would have received something on the order of five years imprisonment (and no "mandatory minimum");[15] largely on the basis of his paper, Marshall received, instead, a sentence of twenty years.

The second consequence is that sentences amongst L.S.D. dealers will vary radically not according to amount of L.S.D. sold, but according to the adventitious factor of carrier weight. Had Marshall and petitioner Chapman[16] merely switched brands of blotter paper with each other, each would have moved two spaces up or down on the

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[15] 600-800 grams of L.S.D. brings a sentence in the range specified in level 22 of the drug table. (U.S.S.G. at 2D1.1). Marshall's sentenced was adjusted upward to level 24 for independent reasons. The sentence under level 24 is 51-63 months.

[16] Again, it must be stressed that petitioner's drug dealing was unrelated to Chapman's.

sentencing table [U.S.S.G. 2 D 1.1, sentencing table],--reducing Marshall's sentence by as much as five years and increasing Chapman's sentence by two. Had Marshall placed his L.S.D. on gelatin, the aggregate would have weighed about 27 grams.[17] This would have placed him four points lower on the sentencing table, reducing his sentence by as much as eight years.

The third consequence is that L.S.D. trafficking is punished far more severely than is trafficking in other drugs, even heroin and cocaine. Marshall received a twenty year sentence for selling just under twelve thousand doses of L.S.D. mounted on just over one hundred grams of carrier. As Judge Posner pointed out in his dissent below, for Marshall to have received a comparable sentence for dealing heroin, he

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[17] Again see, United States v. McGeehan, supra, 824 F.2d at 680.

would have to have sold ten kilograms, enough for one to two million doses; the corresponding amount of cocaine (fifty kilograms) would yield from 325,000 to five million doses.[18] Even "crack" must be distributed at the fifty-thousand-dose level to fetch a twenty year sentence. (Slip Op. at 41-42; United States v. Marshall, supra, 908 F.2d at 1334, Posner, J., dissenting.).

As appears more fully below, the literalist construction of 21 U.S.C. 841(b) which yields such results is wrong. In fact, the statutory language is ambiguous and the legislative history suggests that carrier-weight-based sentencing defeats

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[18] The sources for these statistics with regard to heroin are: Platt, Heroin Addiction: Theory, Research, and Treatment 50 (2d Ed., 1986); cf., Diamorphine 63, 98 (Scott Ed., 1988)). The sources with regard to cocaine are: Washton, Cocaine Addiction: Treatment, Recovery, and Relapse Prevention 18 (1989); Cocaine Use in America: Epidemiologic and Clinical Perspectives 214 (Kozel & Adams, Eds.), N.I.D.A. Pamphlet, No. 61, 1985.

rather than furthers the expressed aims of Congress.

(A)

Construed Under the Rule of Lenity, The Law Does Not Provide For Carrier-Weight-Based Sentencing

This Court has repeatedly demonstrated a "reluctance to increase or multiply punishment absent a clear and definite legislative directive," [Simpson v. United States, supra, 435 U.S. 6, 15 (1978)], holding, instead, that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Simpson v. United States, supra, 435 U.S. at 15; United States v. Bass 404 U.S. 336, 347 (1971); Rewis v. United States 401 U.S. 808, 812 (1971).

Marshall invokes this "rule of lenity" and urges this Court to construe the statute in his favor for reasons as follows.

(B)

The Language of the Statute Is Ambiguous

Marshall turns first to the language of the statute, itself. Reiter v. Sonotone Corporation 442 U.S. 330, 337 (1979).

Several appellate cases have addressed the meaning of the phrase "mixture or substance containing" with reference to trafficking in L.S.D. In each, the Government position has been that because the words "mixture" and "substance" have plain "dictionary" definitions, the phrase "mixture or substance containing" requires no special judicial construction. E.g., United States v. Daly, 883 F.2d 313 (4 Cir. 1989), cert. den. 110 S.Ct. 2622 (1990); United States v. Bishop, 894 F.2d 981 (8 Cir. 1990). This was the position taken by the Government in opposition to the instant petition. (Brief in Oppos. at 7-9).

This lax construction of the statute

has superficial appeal, and the unanimity of appellate opinion builds confidence in it. On closer examination, however, the confidence fades.

(1)

The Phrase "Substance Containing ... L.S.D." Has Been So Variously Interpreted by Different Courts and Professionals That It Cannot Be Said to Be "Plain" or "Unambiguous"

Consider, for example, the phrase "substance containing L.S.D.." Several Courts of Appeals have taken up this literalist position: paper is a substance; when paper "contains" L.S.D., it is a "substance containing L.S.D." See, United States v. Daly, supra, 883 F.2d at 317-318; United States v. Bishop, supra, 894 F.2d at 986; see, also, United States v. Taylor 868 F.2d 125, 127 (5 Cir., 1989).

These holdings, which equate "substance containing" with "vessel containing" are problematic, because it does not appear that

Congress ever intended to include other sorts of common "vessels," such as vials or syringes, in the weight of a drug for sentencing purposes. E.g., United States v. Smith 840 F.2d 886, 888 (11 Cir., 1988), cert. den., 488 U.S. 859 (1988).[19] The list of excluded "vessels" is not restricted to hard objects, such as vials. When illegal drugs are sold in capsules *made of gelatin*, the weight of the capsules is not included in the calculation of weight for sentencing purposes. E.g., Thomas v. United States 239 F.2d 7, 8 (10 Cir., 1956). Nor does the weight of baggies in which drugs are packaged for shipment go into the

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[19] This suggests an ironic scenario. There are rare instances in which L.S.D. is legitimately possessed by research laboratories. Such "legitimate" L.S.D. is packaged in ampoules, [Wells, Psychedelic Drugs 48 (1974)]. If "mixture or substance" includes blotter paper but not ampoules, dealers who steal L.S.D. to sell it are rewarded for their theft with a significantly reduced sentence.

calculation of weight for sentencing purposes. United States v. Luster 896 F.2d 1122, 1127 (8 Cir., 1990). Only in L.S.D. cases does the Government argue that gelatin or packaging materials are "substances containing" the illegal drug.[20]

The Court of Appeals in the instant case refused to construe the phrase "substance containing" as broadly as did the Daly and Bishop Courts, citing to the absurdity of weighing a single dose of L.S.D. "contained" in a heavy glass bottle or a jetliner for distribution. (Slip Op. at 7; United States v. Marshall, supra, 908 F.2d at 1317).[21]

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[20] In this case it appears that the Government chemist excluded some packaging materials from his net weight calculation. This apparent recognition that at least some packaging materials cannot figure in the sentencing calculus only underscores the inconsistency of weighing others.

[21] It is well known that cocaine and heroin dealers sometimes, when caught, swallow the balloons into which they have (continued...)

The Seventh Circuit was, of course, correct in this regard. But the point here is not only that a narrower reading of the phrase "substance containing" is the correct one, but that the phrase "substance containing" is sufficiently ambiguous that various Courts have disagreed over its definition, although each has proclaimed it to have a plain meaning.

In fact, "substance" has two different and incompatible meanings. "Substance" refers either to the unchanging essence of a thing or to any material object, however

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[21](...continued)
placed the drug for shipment. If such a dealer is thereafter captured, literal application of the phrase "substance containing" would require the arresting agency to weigh the dealer. This also might occur in L.S.D. cases. Grinspoon & Bakalar, Psychedelic Drugs Reconsidered, p. 77 (Basic Books, 1979), report that L.S.D. used to be smuggled inside the fingernails of distributors. (See, also, Tr. 77).

alloyed or composite its composition may be.[22] Only under tne latter, broader, meaning does the phrase "substance containing" refer to a carrier medium on or in which L.S.D. has been placed.

Under the first meaning, a "substance containing L.S.D." is something which is "essentially" L.S.D., for example L.S.D. in solution or an "isomer" of L.S.D. This was the sense to which the Government's own chemist below repeatedly referred to the L.S.D. (E.g., Tr. 8:24, 9:2-3, 11:4, 15:3).[23] This was also the sense in which the word was used in United States v.

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[22] Black's Law Dictionary (6 Ed., 1990) contains only the first definition, defining "substance" as the "[e]ssence as distinguished from the form." If blotter paper is the "form," and L.S.D. is the "essence," blotter-paper-plus-L.S.D. is not a "substance" containing L.S.D. under this definition of "substance." The dictionary does not define "mixture."

[23] Further to complicate matters, on one occasion, he referred to the blotter paper as a "material," (Tr. 9:16 and 20-21), although on another he referred to the L.S.D. at the "material." (Tr. 11).

Healey 729 F. Supp. 140, 142 (D.C. D.C., 1990), which reasoned that "a substance is a "species of matter of a definite chemical composition, or "[a]ny particular kind of corporeal matter" ..." By contrast, "[a] piece of paper soaked in ink, beer, or L.S.D. is not a kind or species of matter." United States v. Healey, supra, 729 F.Supp. at 142. While such a piece of paper might be a "substance" in a loose sense, it is conceptually opposite to a "substance" in the narrower sense of "substance"-as-"essence".

In sum, the phrase "substance containing L.S.D." is an ambiguous one because "substance" has two plain, but contrasting meanings.

(2)

The Phrase "Mixture Containing" Is Also Ambiguous

Nor have Courts had much more luck

with "mixture."

In common parlance, "mixture" means a commingling of compounds.

Here, the Court of Appeals used the term in a somewhat odd sense. The Court reasoned that when L.S.D. in alcohol is applied to blotter paper, the alcohol evaporates, leaving the L.S.D. not "on," but "in" the paper. "You cannot pick a grain of L.S.D. off of the paper. Ordinary parlance calls the paper containing tiny crystals of L.S.D. a mixture." (Slip Op. at 7-8; United States v. Marshall, supra, 908 F.2d at 1317).

This definition is "odd" because the Court of Appeals has not described a true mixture. "Mixture" means reciprocal blending; a salad is "mixed" because the ingredients are distributed amongst each other. According to the Court of Appeals, when L.S.D. is placed on blotter paper, the L.S.D. is "mixed" with the blotter paper,

but not vice-versa, i.e., there is no blotter paper in the L.S.D. In this sense, the L.S.D.-plus-paper agglomeration differs substantially from, for example, a cocaine-plus-manitol combination, which is a true "mixture."

Moreover, the distinction between L.S.D. "in" the fibers of the paper as opposed to "on" them is an odd one; one is hard pressed to fathom why Congress chose to increase drug penalties on the basis of it, since it is of no practical importance. The Government's own chemist testified at trial that if L.S.D. cannot be "picked" off of paper, it can be "licked" off of it.[24] (Tr. at 48). To say that a chemical is a "mixture" with paper because it must be removed with a tongue rather than with a

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[24] Actually, he never said that L.S.D. can *not* be "picked" off of paper. This appears to be a fact which first appears in this record in the opinion of the Court of Appeals.

hand is akin to saying that a lightbulb is a "mixture" with a socket because it cannot be pried out, but must be unscrewed.

But even if the definition of "mixture" adopted by the Seventh Circuit were correct, it would not be dispositive. Again, the problem is that in common speech, the term "mixture" has divergent practical applications. Sometimes "mixture" refers to a blending of ingredients which retain separate identities. But in everyday speech, "mixture" may also refer to the degree of purity possessed by a single item, e.g. the "fuel mixture" required to make an engine run well.

Even if L.S.D.-plus-paper were a mixture in the sense of a blend, it is not a "mixture" in the other sense. In chemistry, however, there *is* a "mixture" of L.S.D. -- i.e. an impure form of it --which is so common that a reasonable mind might think that Congress was referring to

it when it added the "mixture" language to section 841(b). As discussed by the Government's expert at trial, L.S.D. occurs in both a "free base" form and in the form of a tartrated salt. A tartrated salt is a "mixture" of the alkaloid L.S.D. and an acid, in this case tartaric acid. Windholz, et. al., Eds., The Merck Index, Tenth Edition (1983), pp. 805-806; Claus, Ed., Gathercoal & Wirth's Pharmacognosy, p. 508 (3d Ed., 1956, Lea & Febiger, Publishers). This tartrated salt, a common drug of abuse which has long been listed (along with L.S.D.) as a controlled substance in schedule I, [21 U.S.C. 812(c)I(c)(9)], is about twice as heavy as is pure L.S.D.. Merck Index, supra. Readily soluble in water, [United States v. Healey, supra, 729 F.Supp. at 141], dealers like it because it is stable, soluble, and

thus easy to prepare for distribution.[25]

When the Government's chemist at trial used the term "mixture," (to say that Marshall's L.S.D. was "pure" and not a "mixture," (Tr. 11:18)), he may have been referring to the distinction between "freebase" L.S.D. and L.S.D. "tartrate."

The significance of the seemingly arcane distinction between L.S.D. and L.S.D.-tartrate is that between the initiation of weight-based penalties for drug dealing in 1984,[26] and the enactment of the "mixture or substance language in 1986, persons trafficking in this heavier "salt" of L.S.D. might have claimed

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[25] An L.S.D. salt need not, of course, be tartrated. There are as many "mixtures containing L.S.D." in terms of this definition as there are acids to add to the alkaloid. Dictionary of Organic Compounds v. 4, p. 3605 (5 Ed., 1982, Chapman & Hall, Publishers).

[26] Comprehensive Crime Control Act of 1984; Pub. L. No. 98-473, 98 Stats. at Large 2068.

something of a "free ride." "Schedule I," [21 U.S.C. 812(c)I(c)], banned, *inter alia*, "salts, isomers, and salts of isomers of. . .(9) lysergic acid diethylamide, and 21 U.S.C. 841(a) banned trafficking in substances controlled under, *inter alia*, schedule I. However, sentences (prior to 1986) were calculated not on the basis of the weight of the somewhat heavier "salt" of L.S.D., but on the weight of the pure "L.S.D. freebase" contained in the salt, i.e., on the weight of "L.S.D." Fmr. 21 U.S.C. 841(b)(1)(A)(iv) (Supp. III, 1982). A rational interpretation of the phrase "mixture containing L.S.D." is that Congress intended that persons trafficking in L.S.D.-salts would be punished for the whole weight of the salt, rather than for the lesser weight of the "pure freebase" L.S.D.

contained therein.[27]

Here, the trial court apparently thought of "mixture" in this second sense, i.e. as an index of purity.[28] Using this definition, the trial judge wrote that Marshall's paper-plus-L.S.D. was not a mixture. By contrast, the Court of Appeals

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[27] A "hypothetical" illustrates the point. To prevent high blood pressure, Congress bans trafficking in sodium. Later, realizing that sodium is commonly distributed in the form of table salt, Congress bans distribution of "mixtures" containing sodium. Although sodium chloride (salt) is clearly a mixture, no one would think of weighing the t-bone steak upon it had been sprinkled as a means of determining the weight of the sodium mixture. Yet this is precisely what is occurring in L.S.D. cases.

[28] "If the legislature had intended merely to go after L.S.D. regardless of its purity, it could have stopped with the word "mixture" .... But the legislature went on and included the words "or substance containing a detectable amount of" L.S.D. This latter phrase goes beyond merely <u>the mixture of the drug itself</u>,--it clearly contemplates the medium in which the drug is ingested, be it paper, sugar cube, chocolate chip cookies, or any other 'substance.'" <u>United States v. Marshall, supra,</u> 706 F.Supp. at 653.

held explicitly that it was. Again, the point here is not merely that one court was right and the other wrong, but that two courts disagreed over the meaning of a word that both proclaimed to have an obvious meaning.

In sum, courts which agree that the phrase "mixture or substance" is unambiguous, <u>disagree</u> as to the meaning of key words in the words in the phrase. Such disagreement is inevitable in light of the dichotomies in the dictionary definitions of both "mixture" and "substance" and in light of the real-world fact that "mixture containing L.S.D." might well refer to L.S.D.-tartrate as opposed to blotter paper. It thus defies the lessons of two years of appellate litigation to say, as does respondent, that there is ""no ambiguity" in the language of the statute or the Guideline." (Brief in Oppos. at 9). The

"words of the statute themselves," are ambiguous.

Courts are not alone in their confusion. The United States Sentencing Commission has expressed some measure of bewilderment concerning application of the "mixture or substance" language in L.S.D. cases. On November 30, 1988, the Commission noted that construction of the phrase was one of the "Questions Most Frequently Asked" of the Commission. On March 3, 1989, the Commission solicited comments on whether blotter paper ought to be weighed with the L.S.D. 54 Fed. Reg. 41, p. 9136. After comments were received, the Chairman of the Commission wrote to Senator Biden expressing perplexity that persons dealing one hundred doses of L.S.D. on different media would be sentenced at level 12 (10-16 months) for pure L.S.D.; 26 (63-78 months) for paper; and 36 (188-235 months) for sugar cubes. See, United

States v. Daly, supra, 883 F.2d at 316. The Commission's uncertainty further demonstrates that the statutory language is unclear,--even to sentencing professionals.

(C)

The Legislative History Does Not Support a Carrier-Weight-Based Sentencing Scheme

Nor does the legislative history lend support to carrier-weight-based sentencing. If anything, the history suggests a far different intent.

(1)

Congress Did Not Intend a Drastic Increase in Punishment For Street Sales of L.S.D.

The "mixture or substance" language was added to section 841(b) as part of the Anti-Drug-Abuse Act of 1986.

The words "mixture or substance," themselves, do not appear to have been the

subject of much formal discussion in the Congress. They first appear as part of the text of the Senate Bill [S. 2870, §1002. See, 132 Cong. Rec. S. 13649] proposed after the House Judiciary Committee had already discussed and reported on precursor language, the phrase "mixture, preparation or compound." [H.R. Rep. No. 845, 99 Cong. 2d Sess., Pt. 1, at 11-12 (1986)].[29]

The phrase "mixture, preparation or compound" was introduced in support of "[o]ne of the major goals of this bill, ... to give greater direction to the D.E.A. and the U.S. Attorneys on how to focus scarce

[29] Marshall assumes for the sake of this discussion that the underlying intent of both the House and Senate language was the same.

law enforcement resources." (page 11). The Committee directed primary focus on "major traffickers, the manufacturers or the heads of organizations who are responsible for creating and distributing very large quantities of drugs." (page 11). With regard to these, "the Committee selected quantities which if possessed by an individual would likely be indicative of operating at ... a high level. The Committee's statement of quantities is of mixtures, compounds or preparations that contain a detectable amount of the drug,--these are not necessarily quantities of pure substance." (page 12). "The Committee [also] determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping pcp in aluminum foil, and doing so in substantial street

quantities." (page 12).[30]

Interrelated inferences can be drawn from this language.

First, in the Committee's text, "mixture," accompanied by the words "compounds" and "preparations," suggests "mixture" in a "chemical" sense, i.e., the sense of L.S.D. as a tartrated salt or some adulterated form.[31]

Second, although the 1986 legislation was passed in the charged atmosphere of an incipient "war on drugs," nothing in the House Report indicates that the primary purpose of the "mixture or substance" language was to increase penalties for drug dealing.[32] Rather, the goal of the statute

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[30] Senator Byrd echoed this two-tier approach in comments he made to the Senate. 132 Cong. Rec. S. 14301 (9/30/1986).

[31] "Substance," as used by the Committee, denotes the drug, itself.

[32] Indeed, at low rates of dilution, the potential punishment for cocaine and (continued...)

was to assist the justice system in differentiating amongst the occupants of different tiers of the distribution chain. Inclusion of the "mixture or substance" language was designed to foster this goal by, *inter alia*, referring more realistically to drugs in the form in which they were routinely trafficked in bulk.

With this goal in mind, the Committee differentiated between manufacturers and "king pins" who <u>create</u> and distribute <u>large quantities</u> on the one hand, and "managers of the retail traffic" who <u>package</u> drugs, on

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[32](...continued)
heroin dealing may have <u>decreased</u> under the new law, (although it became more certain).
Compare the threshold amounts for high tier treatment under Fmr. 21 U.S.C. 841(b)(1)(A)(i) and (ii), (Supp III, 1982), (100 grams of opiates or 1000 grams of cocaine), with those in current 21 U.S.C. 841(b)(1)(A)(i) and (ii), (1000 grams of "mixture or substance containing heroin" and 5000 grams of a "mixture or substance containing cocaine.)." Under the new statute, one can, for example, traffic in four times the amount of 80% pure cocaine under the 1986 amendments than under the 1984 law before stepping into the high tier.

the other. "Manager of the retail traffic" more accurately describes what Marshall did than does the phrase "major trafficker, manufacturer, or head of organization." Marshall's crime was not to direct a large organization supplying an entire region or regions; Marshall's role was that of a "hands-on" packager of the drug in the form in which it ultimately was sold to consumers in "substantial street quantities."

Marshall has already mentioned in the Introduction to this section of the brief that weighing the carrier for sentencing purposes in this case has placed him at a sentence level otherwise reserved for heroin and cocaine "kingpins" trafficking in millions of doses.

By contrast, weighing the L.S.D. alone would have placed Marshall right about where he belonged: at or near the sentence levels reserved for mid-tier dealers. Section 841(b)(1)(B),-- the section designed to

punish "the managers of the retail traffic,"--imposes five year (or greater) sentences on persons who deal heroin in the 10,000 to 20,000 dose range, and cocaine in the 3250 to 50,000 dose range. This approaches the range of doses that Marshall sold. It is no coincidence that the amount of L.S.D. listed in section 841(b)(1)(B) is one gram, which (according to the "Typical Weight per Dose" table) yields 20,000 doses; both figures correspond to the amount of "pure" L.S.D. and the number of doses of L.S.D. in the blotter paper sold by Marshall.[33]

It is true that in setting up the range of penalties, "the Committee has not generally related. . . quantities to the number of doses of the drug that might be present in a given sample," (H.R. Rept. No.

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[33] The match is only approximate; Marshall's drug trafficking was slightly under the statutory level.

845, supra, at page 12), nor would the committee have been required to do so.[34]

But to construe the "mixture or substance" language as deliberately intended to "warp the statutory design" (Slip Op. at 44; United States v. Marshall, supra, 908 F.2d at 1335), by punishing L.S.D. sales far more severely than trafficking in heroin or cocaine, there must appear on the record some indication that Congress viewed L.S.D. as a greater problem than those other drugs. There is no such indication in the legislative history, and, indeed, all indications are to the contrary.

It appears that L.S.D. was mentioned only once during the six weeks of debate concerning the Anti-Drug bill, when Senator Harkin mentioned that L.S.D. use was holding

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[34] Indeed, even prior to enactment of the "mixture or substance containing" language, L.S.D. trafficking was punished by weight, not by the dose. E.g., Fmr. 21 U.S.C. 841(b)(1)(A)(iv) (Supp. III, 1982).

steady or declining; this comment was not even occasioned by the "mixture or substance" language, but was directed at a wholly unrelated portion of the bill.[35] It appears, further that only one other Senator made reference to L.S.D. during the 1986 legislative years.[36] As has already been discussed, there is no particular reason to suppose that the "mixture or substance"

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[35] Harkin was commenting on a measure to exhort the entertainment industry to refrain from glamorizing drugs.

[36] Senator Paula Hawkins remarked on several occasions that L.S.D. was occasionally being used in conjunction with other drugs. E.g., 132 Cong. Rec. S. 9522 (July 15, 1986) (reference to "space-basing" of crack cocaine mixed with P.C.P. or L.S.D.). Although Hawkins' remarks were not made during debate of the Anti-Drug bill, itself, they may shed some light on the sort of "mixtures" that Congress contemplated.

In any event, the total record does not indicate that Hawkins believed L.S.D. to be a particular problem. Twice, she commented on the record that its use was declining, --"substantially", [132 Cong. Rec. S 9049 (July 23, 1986)], and "markedly," [132 Cong. Rec. S. 16203 (October 14, 1986)].

language was designed to increase the penalty for trafficking in any drug; clearly no such intent appears regarding L.S.D.

(2)

The "Mixture or Substance" Language Was Targeted at Cocaine Dealing, But L.S.D. Does Not Resemble Cocaine

By contrast, in 1986 Congress was obsessed with the cocaine and heroin trade, which figured prominantly in the anti-drug debate.[37] The meaning of the phrase "mixture or substance" with regard to heroin

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[37] A sampling of the first day's House debate is instructive. (All citations are to 132 Cong. Rec. H., Sept. 10, 1986). Representative Gingrich mentioned cocaine and heroin (6523); representative Dioguardi mentioned crack (6526); representative Biaggi mentioned cocaine, heroin, and marijuana (6532); representative Trafficante mentioned addicts and cocaine (6534); representative Wyden mentioned cocaine and heroin (6558).

Particularly ironic was the comment of representative Jeffords, who stated that he had been in the Vermont Attorney General's office during the drug crisis of the 1960s and early 1970s. L.S.D., of course, was rampant then, but not apparently now. "Here we are again, many years later, faced with a drug crisis, but the problem now is cocaine, a much more serious drug." (6574).

and cocaine is, of course, clear. A particularly pernicious aspect of the cocaine and heroin traffic is that dealers increase the volume of available contraband by "cutting" the pure drug with filler.

The problem with interpolating a reference to dealers who place L.S.D. on paper or gelatin into a debate concerning dealers who "cut" heroin or cocaine with dilutant "filler" is that L.S.D. is not "cut" in the same sense as are heroin or cocaine.

In the first place, cocaine as possessed by mid and high-end dealers is roughly 90% pure. [E.g., United States v. Kidder 869 F.2d 1328 (9 Cir., 1989) (cocaine 88-93% pure); United States v. Savinovich 845 F.2d 834 (9 Cir., 1988) (cocaine, 87%-95% pure); United States v. Zavala 853 F.2d 1512 (9 Cir., 1988) (cocaine, 86% pure); United States v. Holmes 438 F.2d 1175, 1176

(11 Cir., 1988) (cocaine, 87% pure).[»] By contrast, Marshall's L.S.D.-plus-paper aggregate was only about six tenths of one percent pure.

Second, when cocaine and heroin are "cut" to forms of less than 80% - 90% purity at the "street" level, the dilution is undertaken for a different purpose (and with a different result) than is the mounting of L.S.D. on carriers. The purpose of "cutting" cocaine and heroin is to increase the absolute amount of adulterated drug in

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» Nor does the result differ with other drugs.

United States v. Bayerle 898 F.2d 28, cert. den. 59 USLW 3223 (4 Cir., 1990) involved 50%+ pure dilaudid; but careful calculation shows that Bayerle could have received virtually the same sentence for a pure sample. In United States v. Baker 883 F.2d 13 (5 Cir., 1989), 11 oz. of 100% pure methamphetamine was combined with a 1-23% pure "mixture" to produce an aggregate amount for sentencing purposes. However, (unlike L.S.D.), the guidelines makes a purity- adjustment for methamphetamine, so Baker ended up receiving a lesser sentence for the combined sample than she would have received for the pure drug, alone.

circulation. Mounting L.S.D. on carrier media merely makes fixed doses of the drug more tractable for consumers. Again, the basic difference is that cocaine and heroin are sold by weight- of-mixture, but L.S.D. is not. The "purity" of the dose relative to the carrier medium is irrelevant to the L.S.D. consumer.

Even if blotter paper can be crammed into a procrustean analogy with the "cut" used in cocaine transactions, the analogy would not matter for three reasons.

First, there is no indication that Congress, itself, meant to make the analogy. The language of House Report 845 indicates that Congress was clearly aware of the role of "cut" in cocaine and heroin trafficking. It is questionable whether Congress was similarly aware of the role of carrier media in L.S.D. cases. Even if it was thus aware, it is by no means clear that anyone in Congress analogized L.S.D. carriers to the

dilutants used to increase the street supply of other drugs. And there is simply no evidence that in using the phrase "mixture or substance," Congress meant to refer to carrier weight, or to base punishment in terms of it.

Second, even if one could analogize carrier media to "cut," the statutory language, itself, remains ambiguous, for reasons discussed in subdivision (B) of this argument, i.e., that the words "substance" and "mixture" are susceptible of various interpretations. Analogy to "cut" does not make the "dictionary" or scientific meanings of "mixture" or "substance" any clearer. Statutes do not govern by analogy; they govern by clear and unambiguous command. No such command was made in the statute here.

In sum, it does not appear that Congress intended the phrase "mixture or substance" to refer to carrier media in

L.S.D. cases.

(D)

Congress Did Not Wish to Undermine The Determinate Sentencing Act By Weighing Carrier Media in L.S.D Cases

A further indication that Congress did not intend that carrier media be weighed in calculating sentences in L.S.D. cases is that to do so would frustrate the structure of the Determinate Sentence Act; the Guidelines promulgated thereunder; and the work of the Sentencing Commission.

The Determinate Sentence Law was promulgated for a number of reasons, an extremely important one of which was to insure uniformity in the sentencing process. 18 U.S.C. 3553(a)(6). The United States Sentencing Commission was chartered, in part, to implement this aim. 28 U.S.C. 991(b) (1)(B).

In establishing drug sentence guide-

lines, the Commission purported to have adhered to this statutory mission. In its comment on the drug-table, the Sentencing Commission stated that "[o]ffenses under 21 U.S.C. §§ 841 and 940 receive identical punishment based upon the quantity of the controlled substance involved .... The base offense levels in § 2D1.1 [the Drug Table] are either provided directly by the Anti-Drug Abuse Act of 1986 *or are proportional to the levels established by statute, and apply to all unlawful trafficking.* (emph. added). See, also, Comment, U.S.S.G., at A(3), p. 1.2: "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." See, also, 28 U.S.C. 991(b)(1)(B).

The determinate sentence law does not require equal sentences for the respective drugs, nor does it require that L.S.D.

dealers be sentenced by the dose. But the foregoing pronouncements indicate that some degree of systemic uniformity was contemplated for the drug-sentence scheme as a whole. At very least, it appears that Congress and the Commission intended to treat offenders who traffic in identical amounts of a single drug comparably to one another.

Carrier-weight-based sentencing warps this entire scheme.

In the first place, as previously shown, it punishes L.S.D. at an exaggerated level relative to other drugs, at variance with the proportionality language quoted above.

Second, as has also been shown, basing punishment on carrier-weight differentiates between various L.S.D. dealers in a perverse manner that is completely out of keeping with the spirit of uniform determinate sentencing.

Marshall has already illustrated the discrepency in this particular case by the hypothetical exchange of his paper with Chapman's. But the perversity plagues all aspects of carrier-weight-based sentencing. The range in weights amongst commonplace L.S.D. "carriers" is from 0.00225 gm./dose for gelatin, [United States v. McGeehan 824 F.2d 677, 680 8 Cir., 1987)], to 0.016 gm./dose for the blotter paper used in United States v. Rose 881 F.2d 386, 387 (7 Cir., 1989). A dealer can receive a ten year mandatory minimum sentence with a mere 600+ doses by using Rose's blotter paper or by using 4200+ doses with McGeehan's gelatin. (Marshall would have qualified for the ten year minimum with 1060 doses of his lightest blotter paper).[39]

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[39] The problem is magnified outlandishly when sugar cubes,--another common carrier medium, [see, United States v. Marshall, supra, 706 F.Supp. at 652],--are used. A sugar cube weighs 2.2 (continued...)

An even greater discrepancy results when an identifiable amount of L.S.D. is sold, but no contraband is recovered. Then, and only then [United States v. Bishop, supra, 894 F.2d at 987], sentences are calculated in accordance with a table of "Typical Weight Per Unit," U.S.S.G. 2D1.1. L.S.D. weighs .05 mg. per dose according to this table. Under this system, had Marshall's L.S.D. actually entered the stream of commerce, and been consumed (presumably the very thing the drug laws were designed to prevent), Marshall would have been "rewarded" with a sentence of no more than seventy-eight months -- less than

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[39](...continued)
grams, and dealing 50 doses of L.S.D. on sugar cubes, (i.e., 110 grams of sugar plus L.S.D.), can fetch a twenty year sentence.

Tablet-cases, one of which appeared before this Court as recently as 1974, [Dorzynski v. United States, supra, 418 U.S. 424], also present a magnified instance of the problem of carrier-weight- based sentencing.

a third of what he actually received.

This produces a crazy-quilt of sentences even in "ordinary" L.S.D. cases in which paper or gelatin is used as a carrier. Sentences can vary by four or more sentence-table-levels merely on the fortuity of what carrier medium is selected by the dealer. Indeed, the weight of the carrier medium accounts for virtually the entire length of any sentence in a typical L.S.D. case. As Judge Posner sardonically remarked, "Congress might as well have said: if there is a carrier, weigh the carrier and forget the L.S.D." (Slip Op. at 40; United States v. Marshall, supra, 908 F.2d at 1333).

It is unlikely that Congress would scuttle the whole Determinate Sentence Law with regard to L.S.D. a mere two years after promulgating that law for all criminal offenses. More likely, Congress never intended that carrier-weight form the basis for sentencing in L.S.D. cases.

Interim Conclusion

"Federal crimes ... "are solely creatures of statute." Liparota v. United States 471 U.S. 419, 424 (1985), citing United States v. Hudson 7 Cranch 32 (1812). Accordingly, when assessing the reach of a federal criminal statute, we pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. .... "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." Williams v. United States 458 U.S. 279, 290 [(further citations omitted)]." Dowling v. United States 473 U.S. 207, 213- 214 (1985). Congress has not spoken clearly here. The language of the statute is ambiguous; the

intent of Congress, delphic. Stanley Marshall ought not to be serving a twenty year sentence on the basis of so unclear an expression of will.[40]

II

CARRIER WEIGHT BASED SENTENCING VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY DEPRIVING CRIMINAL DEFENDANTS OF EQUAL PROTECTION OF THE LAWS FOR IRRATIONAL REASONS

Introduction

Sentencing schemes which discriminate irrationally between classes of offenders violate the equal protection clause of the

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[40] Two other canons of statutory construction militate in favor of Marshall's position. First, statutes should be construed to avoid absurd results. Sheridan v. United States 487 U.S. 392, 402, fn. 7 (1988). Second, constructions which cast doubt on Constitutionality should be avoided. As Marshall demonstrates in the following sections of his argument, construction of the phrase "mixture or substance containing" to include carrier media raises significant Constitutional problems.

Fourteenth Amendment. Eisenstadt v. Baird 405 U.S. 488 (1972); see, also, Marshall v. United States 414 U.S. 417 (1974); McGinnis v. Royster 410 U.S. 263 (1973).[41]

In Bolling v. Sharpe 347 U.S. 497 (1954), this Court recognized that the Due Process clause of the Federal Constitution operated to guarantee equal protection of the laws in jurisdictions not directly covered under the parallel Fourteenth Amendment guarantee.

Even assuming, (for the sake of argument), that Congress did intend to base

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[41] This Court cannot, of course, review the discretion exercised by individual judges within the bounds of a Constitutional sentencing statute. Williams v. Illinois 399 U.S. 235, 243 (1970); Williams v. New York 337 U.S. 241, 248-249 (1947). At issue here is not, however, individual sentences, but an entire criminal sentencing scheme. Cf., Mullaney v. Wilbur 421 U.S. 624, 696-697, 697, fn. 23 (1975), citing United States v. Tucker 404 U.S. 443 (1972). This Court has held that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process clause." Gardner v. Florida 430 U.S. 349, 358 (1977).

sentences in L.S.D. cases on the weight of carrier media, such a sentencing scheme in L.S.D. cases offends against the equal protection component of the Federal Due Process clause.

As appears below, that scheme makes no sense at all. "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant." (Slip Op. at 39; United States v. Marshall, supra, 908 F.2d at 1333, Posner, J., dissenting). For this reason, the carrier-weight-based sentencing scheme in L.S.D. cases cannot stand up to even minimal rationality review.

(A)

Carrier-Weight-Based
Sentencing Irrationally
Distinguishes
Amongst Identical Defendants
Who Commit Identical Crimes

Discussion in section I of this brief has illustrated the inequalities implicit in

carrier-weight- based sentencing. Sentences rocket up or down the sentencing table depending on a wholly adventitious factor.

Nothing in the crime of selling L.S.D. warrants distinguishing amongst carrier media to which the drug happens to be applied. As previously explained, the type of carrier onto which a dose of L.S.D is mounted is irrelevant to the consumer of the drug. "A person who sells L.S.D. on blotter paper is not a worse criminal than one who sells the same number of doses on gelatin." (Slip Op. at 39-40; United States v. Marshall, supra, 908 F.2d at 1333, Posner, J., dissenting).[42] Indeed, a dealer is unlikely even to be aware of the weight of the carrier. Petitioner, who sold an aggregate weight of four ounces of drug-

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[42] Nor is the dealer who manages to flush away his drugs before the D.E.A. arrives, and thus reap the benefit of "Typical Weight Per Dose" sentencing [United States v. Bishop, supra, 894 F.2d at 987], a better person.

plus-carrier, probably would not have noticed had his carrier been marginally lighter or heavier, yet he would have received a lesser sentence had his aggreggate amount of paper been less than half an ounce lighter.

But under the sentencing scheme championed here by the Government, persons who traffic in identical amounts of L.S.D. receive radically different sentences based entirely on the varying weights of the media on which those doses happen to be mounted.

(B)

These Sentencing Inequalities Are Not Rationally Related To The Purposes of the Anti-Drug Statutes

It has thus been established that carrier-weight-based sentencing is premised on a fortuitous distinction. The next question for analysis is whether this "distinction ... [has] some relevance to the

purpose for which the classification is made," [Baxtrom v. Herald 383 U.S 107, 111 (1966); see, Eisenstadt v. Baird, supra, 405 U.S. 438], without which it must be held to violate the Due Process Clause.

As appears below, not only does carrier-weight-based sentencing fail to further the aim of the anti-drug legislation of which it was a part, but it in fact frustrates such laws.

The aim of the Anti-Drug Act of 1986 was to punish "kingpins," especially those dealing heroin and cocaine, and, to a lesser extent, of punishing "managers of retail traffic" distributing "substantial street quantities" of illicit drugs. The goal of the classifications, according to the House Report, [H.R. No. 845, supra, at 11], was to allocate scarce law enforcement resources for the war on drugs.

To the degree that limited enforcement resources are wasted pursuing mid-tier

L.S.D. dealers, the statutory aim is frustrated.

Should carrier-weight-based sentencing prevail, those few L.S.D. dealers who continue to market their drugs on heavy paper carriers will remain tempting targets for law enforcement. They are, after all, notoriously easy "marks," (naive, trusting "hippies"), and carrier-weight-based sentencing distorts the magnitude of an L.S.D. "bust" to reflect favorably on the prowess of the arresting officer. Resources will thus be misdirected towards apprehending mid-level dealers while larger-scale dealers in more dangerous compounds may be neglected.

Most L.S.D. dealers will, of course, respond to carrier-weight-based sentencing by changing their marketing technique. But these changes will not be of benefit to Law Enforcement.

For example, sophisticated L.S.D.

dealers might discover that they can dot their L.S.D. on paper with a pipette, and claim that the mixture containing L.S.D. is limited to the area covered by the dot. It is hard to imagine how encouragement of such techniques will seriously diminish trafficking in L.S.D.[43]

Even if "alternative technologies" such as the use of pipettes cannot be brought into the L.S.D. trade, dealers can resort to other tricks. They can simply ship their ware in smaller increments. Or they can cluster L.S.D.-labs closer to the sites at which the drug is applied to paper, thus making for smaller "production runs." Or they can find and use lighter carrier media, (gelatin is already available). All of these eventualities will only make shipments of L.S.D. smaller and harder to detect, and

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[43] The imprecision of pipette application might, moreover, lead to accidental overdoses.

will only frustrate law enforcement efforts.

Although Congress was probably happy that L.S.D. use was declining, there is nothing in the legislative history which suggests that Congress wanted to make further efforts at detection and eradication of the traffic more difficult. Carrier-weight-based sentencing does nothing to discourage the appetite of individual customers for the drug, nor does it make manufacture of the drug (now a bargain at 35 cents a dose [Slip Op. at 42, United States v. Marshall, supra, 908 F.2d. at 1334, Posner, J. dissenting]) more difficult. It only poses some readily soluble logistical hurdles in the distribution chain. Carrier-weight-based sentencing actually frustrates efforts to curtail manufacture, distribution, and consumption of the drug.

(C)

No Rational Basis Has Been,
Or Can Be, Advanced For
Carrier-Weight-Based Sentencing

Of course, Congress need not set out the reasoning underlying its legislative choices, and when a rational result can be inferred, even a statute enacted in ignorance will stand up to Due Process scrutiny. United States Railway Retirement Board v. Fritz 449 U.S. 166, 174 (1981). But when it is clear that no rational reasoning can be advanced, the statute must be deemed to fail the minimum requirements of "rationality" analysis.

At oral argument on appeal, no rational reason for the statute was advanced by the Government. (Slip Op. at 33, fn. 7; United States v. Marshall, supra, 908 F.2d. at 1330, Cummings, J., dissenting). Until the opinion of the Seventh Circuit was filed, the closest the Government and other Courts came to stating a rational basis for the

interpretation was some sort of gut preference for literal readings of statutes. While the wording of a statute is of first and final importance, literalism in statutory construction is neither a constitutionally compelled doctrine nor a rule of public policy. Watt v. Alaska 451 U.S. 259, 266 (1981)."

Apart from a preference for literalism, Marshall is aware of only three purported justifications for construing the "mixture or substance" language in section 841(b) to include carrier media. These rationales, advanced by the Seventh Circuit in its opinion below, are considered in sequence.

First, it has been suggested that Congress may have chosen to penalize blotter paper sales because they have contributed to

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" To the contrary, "[t]he interpretation of the laws is the proper and peculiar provence of the courts." Hamilton, et. al., Federalist (Bourne Ed., 1901) at 101.

the renewed success of L.S.D. (Slip Op. at 21; United States v. Marshall, supra, 908 F.2d at 1325). This assertion simply flies in the face of the legislative history of the act. The only "findings" in the whole legislative history with regard to L.S.D. are (1) that it has not achieved renewed success; and (2) that, on occasion, it is consumed not with blotter paper but with other drugs. One cannot torture out of this a legislative intent to root-out a blotter paper problem which no one had theretofore detected, and the actual decline in L.S.D. use cited by Senator Harkin would have made such intent irrational.

Second, it has been suggested that since most L.S.D. transactions occur on blotter paper, it is not unfair to weigh it. (Slip Op. at 21-22; United States v. Marshall, supra, 908 F.2d at 1324). But transactions on gelatin are common also, as are transactions in pure L.S.D.. That the

plurality of transactions may be on blotter paper,--there is no actual support for this proposition in the record,--merely begs the question and does not answer it. In any event, the "fairness" argument proves too much. Most cocaine transactions are in glassiene envelopes, yet these are not weighed; most drugs are shipped by airplane, yet airplanes are not weighed either.

Finally, it has been suggested that it is too difficult to isolate and weigh L.S.D. accurately, so it is fair to weigh blotter paper. (Slip Op. at 22; United States v. Marshall, supra, 908 F.2d at 1325). At outset, this assertion is untrue; in every published L.S.D. case including this one, the pure L.S.D. has been weighed, and in the instant case it was even separated from its isomers. By contrast, the Government chemist stated that he weighed not only blotter paper but contaminants on it as well,--hardly a model of scientific

precision. In any event, "[t]he constitutional imperatives of the Equal Protection Clause cannot be satisfied by mere conjecture as to administrative inconvenience." Frazier v. Manson 703 F.2d 30, 39 (2 Cir., 1983).

In sum, neither Congress nor any one else has thus far proposed a rational reason for basing sentencing in L.S.D. cases on the weight of the carrier.

(D)

For the Foregoing Reasons, the Carrier-Weight-Based Sentencing Scheme Violates the Equal Protection Component of the Due Process Clause

Congress need not punish similar conduct identically. United States v. Batchelder 442 U.S. 114 (1979). But "[t]he Constitution requires that Congress treat similarly situated persons similarly," [Rostker v. Goldberg 453 U.S. 57, 79 (1981)], and "in the administration of

criminal justice no different or higher punishment should be imposed upon one than such is prescribed to all for like offenses. (sic)." Truax v. Corrigan 257 U.S. 312, 333 (1921).

Thus, while it is Constitutionally permissible to allow prosecutors and courts to select between alternative punishments for like offenses, it is impermissible to set out a single sentencing scheme which imposes mandatory increases or decreases in punishment on the basis of wholly adventitious factors. Should such irrational discrimination occur, prosecutions under the statute are assailable as a violation of Equal Protection. United States v. Batchelder, supra, 442 U.S. at 124-125, 126, fn. 9.

No rational reason which has been or can be advanced in support of a sentencing scheme based on the adventitious weight of the carrier media in L.S.D. cases.

Assuming, for the sake of argument, that Congress did intend the statute to function as it has functioned here, Congress has acted unconstitutionally. The statute must be overturned as violative of the Due Process clause of the Federal Constitution.

III

THE CARRIER-WEIGHT-BASED SCHEME VIOLATES THE DUE PROCESS CLAUSE FOR PROCEDURAL REASONS, AS WELL

The Due Process clause has a procedural as well as a substantive component. Application of carrier-weight-based sentencing to Marshall also offends against this component of the Due Process clause.

Although Congress may establish different punishments for identical conduct, [United States v. Batchelder, supra, 442 U.S. 114], it can only do so only by way of clearly written statutes which give notice to the accused of the range of punishments.

"[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." United States v. Batchelder, supra, 442 U.S. at 123.

Here, the "mixture or substance" language gave no notice to potential offenders as to how they might be penalized.

Marshall committed his crime in mid-1988, when the legislation in question was quite new and had not been given a definitive judicial construction; it will not be definitively construed until a decision is announced in the instant case.[45]

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[45] Marshall's case, United States v. Marshall, supra, 706 F.Supp. 650, was only the second judicial opinion to construe the new "mixture or substance" language, and the previous case, United States v. Bishop 704 F.Supp. 910 (N.D. Iowa, Feb. 7, 1989), was decided only three days before Marshall's trial was held. United States v. McGeehan, supra, 824 F.2d 677 had addressed the issue, but only in dicta.

Concededly, a criminal defendant violates an unconstrued statute at his peril. But persons in Marshall's position received no notice from the statutory language as to how the arbitrary fact that he mounted his L.S.D. on blotter paper instead of on gelatin, for example, would amount to a near-doubling of his sentence.[46] He was thus deprived of notice of the consequences of his criminal act, in violation of the Due Process clause of the Federal Constitution.

IV

CARRIER-WEIGHT-BASED SENTENCING DEPRIVES DEFENDANTS OF A FUNDAMENTAL RIGHT, AND SUCH DEPRIVATION MUST BE ASSESSED UNDER STRICT CONSTITUTIONAL SCRUTINY

Petitioner Chapman argues that

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[46] The "newness" of the Determinate Sentence Law, with its mandatory minimum sentences and its precise sentencing guidelines, provided a context of further subjective uncertainty for criminal defendants.

carrier-weight-based sentencing amounts to an arbitrary deprivation of liberty, and that the deprivation must be scrutinized under the strict standards by which this Court examines claimed impairments of fundamental rights.

Chapman has briefed this issue so extensively that Marshall need not add much to his presentation of the issue.

Inequalities in economic or social welfare regulation are permissible if some rational basis for the inequality has been or can be articulated. United States Railroad Retirement Board v. Fritz, supra, 449 U.S. at 174, fn. 10; Dandridge v. Williams 397 U.S. 471 (1970). Stricter scrutiny has traditionally been afforded for questions involving rights named in or implied from the Constitution. See, discussion in San Antonio Independent School District v. Rodriguez 411 U.S. 1, 33-34 (1973).

Plainly, "liberty" is a fundamental interest guaranteed by the Due Process clause. Imposition of a sentence of imprisonment impinges on this interest.[47]

Despite this, in Marshall v. United States 414 U.S. 417 (1974), this Court declined to extend strict scrutiny analysis to unequal allocation of benefits to Federal Prisoners under a "rationality" standard. Similarly, in McGinnis v. Royster 410 U.S. 263 (1972), this Court reviewed unequal allocation of sentence-reducing "good-time" benefits under a "rationality" standard.

These cases do not, however, stand for the proposition that inequalities in sentencing should be reviewed under a "mere rationality" test. Although both of these cases involved criminal sentencing, they

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[47] It also involves a restriction, over time, of the right to travel from place-to-place which is, itself, fundamental. Shapiro v. Thompson 394 U.S. 618 (1969).

involved denial of benefits, rather than an unequal allocation of sentencing impairments. Benefits are not the same as impairments, so these cases do not directly address the standard by which unequal allocation of punishment should be measured.

Several of this Court's cases suggest that unequal allocation of detriment might be reviewed under a more exacting standard. In Skinner v. Oklahoma 316 U.S. 535 (1941), this Court used "strict scrutiny" analysis to strike down a forced vasectomy statute which discriminated arbitrarily amongst prisoners. This Court justified its analysis on grounds that childbearing was a fundamental right, notwithstanding its refusal to recognize such a right a few years earlier in Buck v. Bell 274 U.S. 200 (1927). Similarly, in Williams v. Illinois 399 U.S. 235 (1970), this Court invalidated a sentencing-discrimination based on wealth notwithstanding that wealth is not, itself,

a suspect classification under the Constitution, [San Antonio Independent School District v. Rodriguez, supra, 411 U.S. 1].

Of course, a decision by the legislature to criminalize given misconduct will provide compelling enough reason to warrant a restriction on liberty, even if severe. But "[t]he safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." Mullaney v. Wilbur 421 U.S. 684, 698 (1975). Wilbur invalidated a Maine procedural hurdle which tended to favor the state in proving that a homicide was murder as opposed to manslaughter, thus increasing the potential sentence faced by the accused. While the standard of review in Wilbur was not spelled-out, it would appear that this Court strictly considered

the impairment claimed by Wilbur as against any justification for the procedure in state law.

Sentencing is as "critical [a] stage," [Mempa v. Rhay 389 U.S. 128, 134 (1967)], of a criminal case as is the trial, itself; in the instant case, the entire conflict of the parties was over the length of Marshall's sentence. In resolving this conflict, Marshall was entitled to receive strict judicial scrutiny of a scheme which increased the length of his sentence from five to twenty years as a result of a fortuity.

Marshall believes he can prevail in this case even under a "mere rationality" standard. But if for some reason he cannot, he respectfully requests that this Court review strictly a scheme which has taken so large a portion of his life for so gossamer a reason.

V

BASING SENTENCE LENGTH MOSTLY ON CONDUCT UNRELATED TO ACTUAL CULPABILITY VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS

(A)

This Court Should Consider This Contention Even Though Chapman Did Not Pose It

This Court understandably "disapprove[s] of the practice of smuggling additional questions into a case after we grant certiorari." Irvine v. California 347 U.S. 128, 129 (1954).

However, Marshall raised an Eighth Amendment claim below, and again in his petition for a writ of certiorari.[**] See,

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[**] See, Appellant's Opening Brief at 19: "As we previously pointed out, had defendant been sentenced on the basis of the weight of the drug, he would have received a sentence of 41 to 51 months. However, defendants sentence is roughly two hundred months more because of the inclusion of the weight of the paper. This 230% increase is totally disproportionate to the offense committed and in clear violation of (continued...)

e.g., Peters v. Kiff 407 U.S. 493, 495 (1972). The certiorari petition is still pending as a result of unusual procedural accidents in this case.

Marshall believes that his Eighth Amendment claim has potential merit and might be useful to this Court in consideration of this case. The Eighth Amendment analysis tends to merge with Due Process claims already advanced.

With deference to the traditions of this Court, Marshall respectfully requests that this Court, should it choose to do so, consider the below-stated claim.

"(...continued)
defendant's Eighth Amendment rights. There is simply no penalogical justification for such a sentence ...." The claim was briefed by the Government in its brief at pages 14-16. Appellant replied at page 6 of his reply brief. The Court considered the claim, albeit cursorily. (Slip Op. at 12; United States v. Marshall, supra, 908 F.2d at 13). Marshall raised it again in his certiorari petition at pages 51-58.

(B)

Basing Sentence Length on Conduct Not Proportionate To the Gravity of an Offense Violates the Prohibition Against Cruel and Unusual Punishments

The carrier-weight-based sentencing scheme also fails under the Eighth Amendment to the Constitution.

The Seventh Circuit pointed out that longer sentences for lesser offenses have been held not to violate the Eighth Amendment. Hutto v. Davis 414 U.S. 370 (1982). For that matter, a twenty year sentence for L.S.D. dealing,--albeit in excess of the 300,000 dose range,--has been upheld against an Eighth Amendment challenge. United States v. Wylie 625 F.2d 1371 (9 Cir., 1980).

But the absolute length of a sentence is but one factor to be considered in Eighth Amendment jurisprudence. The true test is whether a sentence, however long, is

"proportionate" to the crime. Solem v. Helm 463 U.S. 277, 290-292 (1983). Helm went on to hold that ingredients of proportionality include the harm suffered by the victim and the culpability of the accused. Solem v. Helm, supra, 463 U.S. at 292.

Here, Congress determined that cocaine and heroin dealers trafficking at Marshall's level ought generally to receive sentences of far less duration than that received by Marshall. This sheer disparity is strong evidence of disproportionality, but it is not the only or even the most telling factor.

Perhaps more significant is that punishment here was increased on the basis of an adventitious factor which did not aggravate either the crime or Marshall's culpability in committing it. This is a significant contaminant of the sentencing process, which, when extreme, renders a sentence disproportionate within the meaning

of the Eighth Amendment.

Here, the adventitious non-criminal factor makes up almost the whole length of the sentence. The punishment is excessive indeed.

Use by Marshall of blotter paper was so unrelated to the gravity of the offense as to provide an impermissible basis for increased punishment.[49] Although his L.S.D. was sold with blotter paper, the blotter paper was so unrelated to the actual harm implicit in drug sales that its dominant status as a sentencing-determinate is unconscionable. No one who purchased Marshall's L.S.D. was harmed to a greater

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[49] Under 21 U.S.C. 881(a)(3), material possessed as a container for controlled substances is subject to civil forfeiture, but the statute makes no provision for imprisonment of persons possessing blotter paper.

After Marshall's trial, Congress enacted a civil forfeiture provision more focused on carrier media. 21 U.S.C. 881(a)(9). Again, however, this statute does not provide for increased punishment.

degree because the drug was mounted on paper instead of a gel, or because the paper he used weighed twice as much as Chapman's.[50]

Marshall's contention, although novel, is bolstered by the holding in United States v. Busher 817 F.2d 1409 (9 Cir., 1987). At issue there was a provision of the anti-racketeering statute, (R.I.C.O.), 18 U.S.C. 1963(a), which provided for civil forfeiture of all property involved in a tainted enterprise. Busher, whose enterprise was "essentially legitimate, [and who committed] ... relatively minor R.I.C.O. violations," [United States v. Busher, supra, 817 F.2d at 1415], contended that forfeiture of his entire interest was disproportionate to his

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[50] In this, Marshall's case must be distinguished from those in which punishment is permissibly increased on the basis of factors that, while collateral, are not adventitious. For example, had Marshall diluted his L.S.D. to increase its volume or had he trafficked in a schoolyard, punishment might legitimately be increased. But he did nothing like this to warrant greater punishment.

offense, and the Court of Appeals agreed. It remanded the case for a determination of what portion of Busher's enterprise should be subject to forfeiture.[51]

Over one hundred years prior to Busher, a similar result was reached in United States v. Certain Piece of Land 25 Fed. Cses. 366 (D.Cal., 1870). There, pursuant to a forfeiture statute, the Government sought to confiscate an entire farm, upon a corner of which had been erected an illegal distillery. The Court held that "literal application of [the statutory] language would not only be harsh but unequal,--for it would make the amount of the forfeiture

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[51] Marshall is aware that in United States v. Tax Lot 1500, T.P. 38 So., Range 2 E. 861 F.2d 232 (9 Cir., 1989), the Court of Appeals differentiated between "disproportionate" civil forfeitures and disproportionate criminal forfeitures. The distinction does not matter here. As did Busher, Marshall is challenging a punishment imposed as part of an "in personam" proceeding against him. See, United States v. Busher, supra, 817 F.2d at 1417.

depend not on the value of the distillery, ... but upon the accidental circumstances that the illicit distiller happened to own a large tract, on the corner of which a still ... was erected."

In Robinson v. California 370 U.S. 660 (1962), this Court held that punishment cannot constitutionally be inflicted on the basis of "status" violations. In Weems v. United States 217 U.S. 349 (1909), this Court condemned a series of accessory-punishments including lifelong surveillance and "civil interdiction" for the crime of making false entries in a financial record. Apart from being barbarous, the punishment was disproportionate to the gravity of the offense and to the state-of-mind underlying its commission. Neither Weems nor Robinson directly hold that punishment based on adventitious factors is violative of the Eighth Amendment, but both suggest it.

Here, seventy-five percent of

Marshall's punishment was based on the wholly adventitious factor of the weight of his paper. His sentence is clearly disproportionate under the Eighth Amendment to the Constitution.

CONCLUSION

The Court of Appeals condoned, somewhat glibly, that prosecutors had "the power to excuse the big cheeses while landing on the small fry with hobnail boots." (Slip Op. at 14; United States v. Marshall, supra, 908 F.2d at 1321). Such cynicism would be intolerable under a rational interpretation of the comprehensive anti-drug statutes or under a fully-developed Constitutional jurisprudence. Marshall is a "small fry" who got a wildly disproportionate sentence on the basis of an irrational adventitious factor.

All of the judges on the Seventh Circuit Court of Appeal appear to have

viewed the carrier-weight-based sentencing scheme as "odd," (Slip Op. at 3; United States v. Marshall, supra, 908 F.2d at 1315), and "harsh." (Slip Op. at 24; United States v. Marshall, supra, 908 F.2d at 1325). Judge Posner characterized the sentences at issue here as "exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment. . .implied from the words (taken one by one) of the relevant enactments." (Slip Op. at 43; United States v. Marshall, supra, 908 F.2d at 1335).

But the words of the enactment are not plain. They have multiple referents, and different Courts have construed them differently. In any event, "[o]ne of the surest indexes of a mature and developed jurisprudence is not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object

to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning." Cabell v. Markham 148 F.2d 737, 739 (2 Cir., 1945, L. Hand, Judge), *aff'd* 326 U.S. 404.

It is clear that Congress did not mean to punish L.S.D. dealers on the fortuity of the weight of the carrier media on which they mount the drug. If Congress did mean to do so, they have run afoul of the Fifth and Eighth Amendments to the Constitution.

This case is about a few poorly chosen words which have cost Marshall fifteen years of his life. This is a great injustice which this Court should rectify.

The judgment of the Seventh Circuit should be reversed.

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Respectfully Submitted,

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